

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
	)	No. 1:96CV01285
Plaintiffs,	)	(Judge Lamberth)
v.	)	
	)	
GALE A. NORTON, Secretary of	)	
the Interior, <u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER REGARDING  
PLAINTIFFS' NOTICE OF DEPOSITION OF DONNIE McCLURE**

On January 21, 2005, without any prior communication to counsel for Defendants, Plaintiffs noticed the deposition of Donnie McClure, Records Management Officer, Office of Historical Trust Accounting, for February 8, 2005 (Exhibit A). For the reasons set forth below, the Court should order that this deposition not be taken.<sup>1</sup>

**ARGUMENT**

Plaintiffs are not authorized to take discovery at this time.<sup>2</sup> On September 2, 2004, the

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<sup>1/</sup> As required by Fed. R. Civ. P. 26(c), and Local Rule 7(m), counsel for Defendants conferred with counsel for Plaintiffs in an attempt to resolve this dispute without Court action. Counsel for Defendants sent counsel for Plaintiffs a letter (Exhibit B), asking the reason and basis for this deposition. Counsel for Plaintiffs did not reply. Counsel for Defendants also consulted by telephone with counsel for Plaintiffs about this motion, and counsel for Plaintiffs stated that they would oppose this motion.

<sup>2/</sup> Plaintiffs acknowledge this at page 12 of their recently filed Reply in Further Support of Motion to Amend Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Destroying E-Mail (Dkt. # 2808), where they state, "[Defendants'] sole defense to plaintiffs' litany of instances of destruction – which plaintiffs do not contend to be complete given the bar to plaintiffs' discovery rights in this litigation – consists of . . . ." (Emphasis added; footnote omitted.)

Court restricted all discovery by Plaintiffs except where they first demonstrate that a deposition or document request "involve[s] IIM trust record retention and preservation." September 2 Order at 8 (Dkt. No. 2662). Plaintiffs have not sought to make such a showing.

Furthermore, the Court explained in its September 2, 2004 Order (and in a companion order entered the same day), that it was permitting such limited discovery "to preserve the status quo" pending resolution of the appeals. Id. at 2. The appeals have now been decided<sup>3</sup> and, with respect to the IT security appeal which was the subject of the December 3, 2004 decision, the Court of Appeals has issued its mandate. Cobell v. Norton, No. 03-5262 (D.C. Cir. Jan. 3, 2005). It has not issued its mandate with respect to its decision of December 10, 2004. The parameters of Plaintiffs' intended discovery are unclear. Insofar as they extend to matters subject to the Court of Appeals' December 10, 2004 decision, for which no mandate has issued, this Court's observation in denying Plaintiffs' Request for Emergency Status Conference Regarding the Security of Electronic Trust Records (December 3, 2004) (which sought, *inter alia*, "a comprehensive discovery schedule") that "both the status of the Court's prior Orders and its authority to act in this case going forward are uncertain at this time," remains apt. Order of December 20, 2004, at 2 (Dkt. No. 2789).

With respect to the issue of IT security, the Court of Appeals, although noting greater latitude than in a typical agency case, 391 F.3d at 257, nevertheless described a process, identical to that followed in APA cases and endorsed in its December 10, 2004 decision, which should be followed in reviewing claims that Interior has breached a duty to maintain secure IT records

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<sup>3</sup>/Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); Cobell v. Norton, 2004 WL 2828059 (D.C. Cir. Dec. 10, 2004).

systems:

The district court in *Cobell V* contemplated that the post-liability phase of the underlying litigation would, in part, "involve the government bringing forward its proof of IIM trust balances and then plaintiffs making exceptions to that proof." 91 F.Supp.2d at 31. Given Interior's superior access to information about the state of its IT system security, this was a reasonable way to proceed in evaluating the plaintiffs' request for injunctive relief to disconnect IT systems. But it was error to shift the burden of persuasion to the Secretary to show why disconnecting most of Interior's IT systems was unnecessary to ensure the security of IITD, and the error was not harmless.

391 F.3d at 259 (citations omitted). Before the Court can ascertain whether extra-record discovery is appropriate in this case, Interior must "bring forth" its proof that IITD in its systems is properly secured and file its administrative record, and Plaintiffs should then voice their exceptions. Only at that point will it be appropriate for Plaintiffs to attempt to demonstrate that this is one of the exceptional circumstances in which judicial review of an agency action may consider matters not in the administrative record. Interior is now compiling the administrative record to support its conclusions that relevant systems are A-130 compliant. Because Interior's conclusions constitute final agency action regarding A-130 compliance, Interior expects to provide the Court the A-130 administrative record for the Court's review.

In all but exceptional situations, judicial review of agency action is confined to the administrative record. See Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998) (citations omitted) (in most instances, the APA "limits review to the administrative record . . ."); see also Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 65 (D.D.C. 2002) (citation omitted), aff'd, 333 F.3d 156 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004) ("It is well-established that the scope of review under the APA is

narrow and must ordinarily be confined to the administrative record."). As established thirty years ago in Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam), "the focal point for judicial review [of agency action] should be the administrative record already in existence, not some new record made initially in the reviewing court." Accord Fla. Power & Light v. Lorion, 470 U.S. 729, 743 (1985); see also Common Sense Salmon Recovery v. Evans, 217 F. Supp. 2d 17, 20 (D.D.C. 2002) (citations omitted) ("[P]laintiffs fail to recognize the basic rule that generally discovery is not permitted in Administrative Procedure Act cases because a court's review of an agency's decision is confined to the administrative record."); Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("[C]hallengers to agency action are not . . . ordinarily entitled to augment the agency's record with . . . discovery . . ."); Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 698 (D.C. Cir. 1991) (citations omitted) ("The general principle that informal agency action must be reviewed on the administrative record predates the APA . . ."); Nat'l Law Ctr. on Homelessness and Poverty v. Dep't of Veteran's Affairs, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("discovery is not [generally] permitted prior to a court's review of the legality of agency action . . .")

In contrast to the process required by the Court of Appeals and by established case law, Plaintiffs apparently intend to engage in a roving investigation untethered to any proceeding.<sup>4</sup>

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<sup>4</sup>Even under the usual rules of discovery that would apply in a non-APA case, Plaintiffs would not be entitled to launch such an untethered "fishing expedition" through their proposed depositions, using broad and vague parameters, of these individuals. Alexander v. F.B.I., 186 F.R.D. 113, 119 (D.D.C. 1998) ("[I]t is one thing for a plaintiff who may have spotted a fish to throw his net in that direction; it is quite another to trawl the entire lake to see if it contains any fish at all.")

Plaintiffs seek to adopt an impermissible<sup>5</sup> role for themselves akin to a Court Monitor, overseeing Interior's compliance with its statutory obligations to maintain secure records and investigating every action identified by Interior in its reports<sup>6</sup> regarding the preservation and retention of trust documents.<sup>7</sup>

Once Interior has presented its proof and administrative record and Plaintiffs have voiced their exceptions, the Court can consider any claim Plaintiffs may make regarding their entitlement to discovery. Until that time, good cause exists for the Court to issue a protective order to prevent the noticed deposition.

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<sup>5</sup>If such an "investigative, quasi-inquisitorial, quasi-prosecutorial role" is improper for a Court Monitor, Cobell v. Norton, 334 F.3d 1128, 1142 (D.C. Cir. 2003), then surely it is improper for Plaintiffs.

<sup>6</sup>The Court has ordered Interior to submit reports about preservation and retention of trust documents. See Order of Sept. 9, 2004. Interior has complied. Interior has filed five reports and informed the Court in detail about its actions regarding the preservation of trust records. The Court has ordered Interior to submit quarterly reports on the status of trust reform. Interior has complied. Interior has filed nineteen quarterly reports, which, among other things, have informed the Court about Interior's actions to secure and preserve documents. See, e.g., Department of the Interior, Status Report to the Court Number Nineteen, Nov. 1, 2004, 30-32; Department of the Interior, Status Report to the Court Number Eighteen, Aug. 2, 2004, 29-30; Department of the Interior, Status Report to the Court Number Seventeen, May 3, 2004, 31-33. Plaintiffs' abusive discovery practice has been to take these reports that the Court has ordered Interior to file and then simply to lift various phrases from the reports and request all documents related to that phrase. See, e.g., Plaintiffs' Thirteenth Request for Production of Documents, Category No. 5 to 27 (Exhibit C); Plaintiffs' Fourteenth Request for Production of Documents (Exhibit D) (lifting phrases from Defendants' October 26, 2004 ZANTAZ motion, Dkt. No. 2745). They have also taken the names of individuals identified by Interior in these reports and pleadings and noticed them up for deposition, with no explanation of what relevance such depositions may hold.

<sup>7</sup>To the extent Plaintiffs have propounded this discovery for the purpose of investigating potential criminal contempt allegations, this Court's decision in Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70, 76 (D.D.C. 2003), citing Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 801, 814 (1987), makes clear that the Plaintiffs cannot assume this role. See also Mem. Op. of Sept. 2, 2004 at 4-5 (Plaintiffs prevented from taking depositions of Justice attorneys where purpose was to seek evidence for criminal contempt).

## **CONCLUSION**

For these reasons, Defendants' Motion for a Protective Order should be granted.

Dated: January 25, 2005

Respectfully submitted,

ROBERT D. McCALLUM, JR.  
Associate Attorney General  
PETER D. KEISLER  
Assistant Attorney General  
STUART E. SCHIFFER  
Deputy Assistant Attorney General  
J. CHRISTOPHER KOHN  
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CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2005 the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Donnie McClure* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
Fax (406) 338-7530

/s/ Kevin P. Kingston  
Kevin P. Kingston

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**ELOUISE PEPION COBELL, et al.,** )

**Plaintiffs** )

**v.** )

**GALE NORTON, Secretary** )

**Defendants.** )

**Case No.1:96CV01285**

**NOTICE OF DEPOSITION**

To: J. Christopher Kohn  
United States Department of Justice  
Civil Division  
1100 L Street, NW, Room 10036  
Washington, DC 20005

Mark E. Nagle  
Assistant U.S. Attorney  
Judiciary Center Building  
555 Fourth Street, NW, Room 10-403  
Washington, DC 20001

**Attorney for Defendants**

PLEASE TAKE NOTICE, that on February 8, 2005, at the offices of the Native American Rights Fund, 1712 N Street, NW, Washington D.C. 20036, plaintiffs in this action will take the deposition of Donnie McClure, Records Management Officer, Office of Historical Trust Accounting, U.S. Department of Interior, 1849 C Street, NW, Washington, DC, 20240.

This deposition will commence at 9:30 a.m. and will continue from day to day until completed. Testimony will be recorded by stenographic means. You are invited to attend and examine.



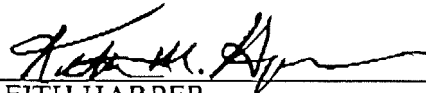
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1712 N Street, NW  
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Attorneys for Plaintiffs

January 21, 2005



# Native American Rights Fund

1712 N Street, NW, Washington, DC 20036

Telephone: 202/785-4166

FAX: 202/822-0068

Website: [www.narf.org](http://www.narf.org)



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Trial Attorney

Tel.: (202) 307-1105 Facsimile: (202) 305-4933  
phillip.seligman@usdoj.gov

January 21, 2005

**BY FACSIMILE**

Mr. Keith Harper  
Native American Rights Fund  
1712 N. St., N.W.  
Washington, DC 20036-2976

Re: Plaintiffs' Deposition Notice of Donnie McClure.

Dear Mr. Harper:

We have received plaintiffs' deposition notice for Donnie McClure, dated today. We are not aware of any basis for your seeking this discovery and are considering appropriate remedies, such as a motion for a protective order and/or a motion to quash. To ensure we fully understand your reasons for seeking this deposition, by 6:00 p.m. Monday, January 24, please let me know the general subject areas to be covered and plaintiffs' legal basis for noticing this deposition on these subjects.

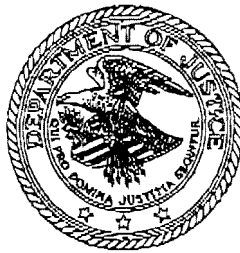
Very truly yours,

Phil Seligman  
Trial Attorney  
Commercial Litigation Branch

\*\*\*\*\*  
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Plaintiffs' Deposition of Donnie McClure

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4) Two corporations that are members of the same "controlled group" as that term is defined in Section 267 of the Internal Revenue Code, including without limitation, parent-subsidary corporations and brother-sister corporations.

5) Any trust, together with the trustees, fiduciaries and beneficiaries of such trust, with respect to which a RELATED PARTY is a trustor, fiduciary or beneficiary.

6) An entity with respect to which a RELATED PARTY owns or holds 50% or more of the equity or voting interest in such entity.

**G. Conjunctions.** As used herein, the conjunctions "and" and "or" shall be construed both conjunctively and disjunctively, and each shall include the other whenever such dual construction serves to bring within the scope of any request or category any DOCUMENT that would otherwise not be brought within its scope.

**H. Number and Gender.** As used herein, the singular form shall include the plural (and vice versa) and the masculine shall include the feminine and/or neuter (and conversely) whenever such construction serves to bring within the scope of any request or category any DOCUMENT that would otherwise not be brought within its scope.

#### **SPECIAL DEFINITIONS**

1. YOU or YOUR shall mean Interior defendants, and each of them, and their REPRESENTATIVES, including without limitation personal representatives and personal counsel.
2. IIM TRUST – the Individual Indian Monies Trust or the Individual Indian Trust.
3. IIM TRUST BENEFICIARY – An individual Indian on whose behalf, as trust beneficiary, an IIM TRUST account is, or at any time has been, should be, or should have been, maintained

by the United States or its agents and an individual Indian who holds or has held a beneficial interest, divided or undivided, in TRUST LAND, including restricted land; the term “IIM TRUST BENEFICIARY” shall include all heirs and successors-in-interest, including executors and personal representatives with respect to an IIM TRUST BENEFICIARY’S lands or estate.

4. LAND TRANSACTIONS – all requested, noticed, pending, completed, voided, invalidated, unconsummated, withdrawn, and voluntary and involuntary land transactions, including but not limited to commercial, industrial, recreational, agricultural, and other types of leases; rights-of-way; easements; other encumbrances, land sales and land exchanges; grazing and range permits; trespass damages assessments, and condemnation.

#### **DOCUMENTS AND INFORMATION TO BE PRODUCED**

**CATEGORY NO. 1:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the “incident report” referenced by Jo Anne Martinez-Kilgore on page 3 of her July 7, 2004 report.<sup>1</sup>

**CATEGORY NO. 2:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – reports prepared by, or on behalf of, CARINO CONSERVATION relating to the IIM TRUST DOCUMENTS or any IIM TRUST BENEFICIARY DOCUMENTS.

**CATEGORY NO. 3:** ALL VERSIONS OF DOCUMENTS in the custody and control of Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate

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<sup>1</sup>Attached as Attachment 2-A to defendants’ *Notice of Filing of Report on Damaged Records by the Department of the Interior*, filed September 21, 2004 (“Preservation Assessment Report to the Office of Trust records of the Bureau of Indian Affairs and to the National Archives and Records Administration”).

to – directly or indirectly, generally or specifically, and implicitly or explicitly – the letter from Ethel Abeita to Michael Billings, dated March 23, 2004.

**CATEGORY NO. 4:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVE S that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the records section or any records discussion included in each quarterly status report filed with the Court.

**CATEGORY NO. 5:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the existence, and all assessments, of “inadequate off-site storage facilities at a number of BIA locations” referenced and admitted to on page 2 of the report attached to the *Notice of Filing of Report on Damaged Records by the Department of the Interior* filed with the Court by the Interior defendants on September 21, 2004 (“Report”).

**CATEGORY NO. 6:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior or their REPRESENTATIVES and all DOCUMENTS transmitted to or received by the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly and explicitly – the “fastpack” of Trust records referenced on page 2 & 7 of the Report, including without limitation all DOCUMENTS that reference and admit to the existence or evidence of mold in such records.

**CATEGORY NO. 7:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that embody, refer to, or relate to – directly or indirectly, generally or specifically, implicitly or explicitly – water damage, mouse dropping damage, or other damage or corruption to Trust DOCUMENTS at the time such records are identified by, or received from, the field or by or from any bureau, office, agency, division, or any REPRESENTATIVE for indexing, inventory, preservation, rehabilitation, re-creation, reconstruction, or for any other purpose.

**CATEGORY NO. 8:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or her REPRESENTATIVE that embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly and explicitly – the selection, negotiation, contracting, inspection, adequacy, condition, and appropriateness of 9,000 square feet of warehouse space at the 4320 Yale DOCUMENT storage facility (“Yale Facility”) referenced in the Report at 2-3, including without limitation all photographs of the interior and exterior of the facility that reflect the condition of the facility as well as DOCUMENTS stored in the facility during February 2004.



**CATEGORY NO. 9:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, implicitly or explicitly – that assess, examine, or discuss whether or not, and the extent to which, the facility referred to as the “AADF Warehouse” by the Interior defendants “meet[s] [or fails to meet] stringent standards for the storage of such commodities which requires it to be free of pests, mold, and moisture and the facility is regularly inspected to ensure that there are no pests” referenced in the Report at 4-5.

**CATEGORY NO. 10:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly and explicitly – the inspection or assessment of the condition of DOCUMENTS held in the Yale Facility referenced in the Report at 5.

**CATEGORY NO. 11:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly and explicitly – the OTR request to NARA “to procure the services of a qualified individual to inspect the affected boxes” referenced in the Report at 6.

**CATEGORY NO. 12:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, implicitly or explicitly – the status of the facility referred to as “AIRR” by the Interior defendants as a “state-of-the-art records storage facility” referenced in the Report at 7.

**CATEGORY NO. 13:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – information reported by Ethel Abeita, OTR director, “that 350 boxes of records contained mold” referenced and admitted to in the Report at 7.

**CATEGORY NO. 14:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – “that the 350 figure was a high estimate of boxes which may have been exposed to some type of harm” referenced in the Report at 7.

**CATEGORY NO. 15:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – “OTR’s intention to deal with the 285 boxes and any others discovered during indexing at the completion of the Albuquerque stage of the indexing project” referenced in the Report at 7-8.

**CATEGORY NO. 16:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – 155 Navajo boxes that have been damaged by mold that are referenced and admitted to in the Report at 8.

**CATEGORY NO. 17:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – whether or not, and manner and the extent to which, the 155 Navajo boxes referenced in the Report at 8 had been damaged by mold prior to delivery to OTR.

**CATEGORY NO. 18:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the acquisition process undertaken by the Interior defendants for the procurement of the “contractor” referenced in the Report at 8.

**CATEGORY NO. 19:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – plans developed, whether or not executed or implemented, and the specific process established to retain a competent contractor to rehabilitate and recreate, if and when necessary, each mold-damaged Trust DOCUMENT referenced generally in the Report at 8.

**CATEGORY NO. 20:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the 27 Blackfeet boxes damaged by water referenced and admitted to in the Report at 8, including all DOCUMENTS evidencing the delivery of such boxes to OTR as water and mold-damaged referred to in the Report at 8-9.

**CATEGORY NO. 21:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the additional 103 (285 - 155 (Navajo) + 27 (Blackfeet)) water-damaged boxes referenced and admitted to in the Report at 7-8.

**CATEGORY NO. 22:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the 35 boxes “found ... to have mouse droppings in them” referenced and admitted to in the Report at 9.

**CATEGORY NO. 23:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the 26 boxes identified in the Southwest Regional Office that were found to contain mouse droppings referenced and admitted to in the Report at 10.

**CATEGORY NO. 24:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the index of Trust records referenced generally in the Report.

**CATEGORY NO. 25:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – all evaluations and assessments of conditions existing in each facility that houses or stores Trust DOCUMENTS, including a complete list of all such site evaluations and assessments whenever prepared as well as each particular site-assessment and evaluation referenced on page 3 of the August 2004 Status Report by the Department of the Interior Office of Trust Records (filed on September 30, 2004) regarding the Pawnee Agency, Northern Pueblos Agency, Laguna Agency, Southern Ute Agency, Southern Plains Regional Office, and the Anadarko Agency.

**CATEGORY NO. 26:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the incident disclosed in the August 2004 Status Report at 3 “that some records were being thrown out.”

**CATEGORY NO. 27:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – policies, guidance, and instructions, as well as the compliance system established and operated by the Interior defendants related thereto, that purport to authorize the Interior defendants or their REPRESENTATIVES to destroy DOCUMENTS, including without limitation the instruction referenced in the August 2004 Status Report at 3 that “BIA employees were reminded that even if a document is a copy, to ensure that the original exists and is properly safeguarded prior to disposing of a copy.”

**CATEGORY NO. 28:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – awards, bonuses, pay increases, and any merit commendation or any criticism or admonishment of James Cason, Ethel Abeita, or Abe Haspel relating to the performance of their duty to ensure the protection and preservation of Trust DOCUMENTS.

**CATEGORY NO. 29:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – Justice Department’s review of, and findings with respect to, the adequacy of the protection of Trust DOCUMENTS by the Interior defendants and their REPRESENTATIVES, including without limitation OTR.

Respectfully submitted,

/s/ Dennis Gingold

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/s/ Keith Harper

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Attorneys for Plaintiffs

December 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing THIRTEENTH REQUEST FOR PRODUCTION OF DOCUMENTS was served on the Interior defendants via facsimile on this day, December 20, 2003 and the following individual by facsimile or regular mail.

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
406.338.7530 (fax)

/s/ Geoffrey Rempel

\_\_\_\_\_  
Geoffrey M. Rempel



Specific examples of the documents and other information being sought (and which are encompassed by such defined terms in the unlikely event they are not encompassed by the definition set forth in Rule 1001) include: All writings, Any printed, typewritten, or handwritten or graphic matter, regardless of medium on which it is produced, reproduced or stored, including without limitation, correspondence, letters, memoranda, e-mail, e-mail backup tapes, phone records, reports, charts, diagrams, blueprints, site plans, business records, personal records, maps, pamphlets, handwritten notes, marginalia, minutes of meetings, notes of meetings or conversations, catalogues, advertising pamphlets, written agreements, contracts, photographs, sound recordings, papers, books, FILES, computer print-outs, diaries and diary entries, calendars, tables, compilations, graphs, recommendations, studies, worksheets, logs, workpapers, summaries, information stored by a computer or on a computer disk, diskette, tape, card or other form of computer memory storage, as well as any electronic recording, tape recording, photograph, video, film, microfilm, microfiche, or similar recording of words, images, sound recordings, pictures, other data or data compilations or information of any kind, including any medium from which information can be obtained and translated into usable form, and all telegrams, transmission by any of the following: telefax, e-mail, facsimile, telex or cable.

**This Request specifically requires YOU to produce ALL DOCUMENTS maintained or presently located on your employees' and agents' person, at their residences, on their private e-mail accounts or anywhere else in their possession, custody, or control.**

When requested to produce a DOCUMENT you are required to produce all VERSIONS thereof.

**B. Version.** "VERSION" or "VERSIONS" means any of the following:



1) Any prior, current, or subsequent version or draft of a DOCUMENT, including without limitation all amendments, alterations, drafts, runs and modifications.

2) Any duplicate (as that term is defined in Federal Rules of Evidence, Rule 1001(4), which defines a duplicate as “a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.”) of a DOCUMENT falling within one or more categories of this Request for Production of Documents, which duplicate is, or at any time has been, different from the DOCUMENT of which it is a duplicate – including without limitation a duplicate with deleted information (*e.g.*, edits, the date/time of creation, receipt or opening of such duplicate DOCUMENT), a duplicate that bears added notations, marginalia, and/or have had other DOCUMENTS affixed or attached thereto such as stapled or paper-clipped notes and "Post-It" type self-stick removable notes. All DOCUMENTS commonly known as “duplicate originals,” *i.e.*, counterparts signed by different signatories, are expressly included in this definition of VERSION.

**C. Delegates, Entities and Their Agents.** Whenever reference is made or information is sought with respect to an entity such as a tribe, corporation, partnership or governmental agency or organization that can act only through individual agents, reference to the acts of such entity are intended to include all acts taken by its agents, directors, officers, employees, members and shareholders who have or claim to have authority to act on behalf of such entity.

**D. Person.** As used herein, the term "PERSON" includes both singular and plural, and refers to any natural person, tribe, firm, association, partnership, joint venture, corporation, governmental agency or organization, estate, trust, receiver, syndicate, or any other group or combination acting as

a unit or affiliated entity. Whenever reference is made herein to any act by a PERSON, such reference is intended to, and does, include reference to any act or conduct performed by such PERSON'S agents, contractors (including without limitation ZANTAZ), partners, predecessors, successors, employees, and/or REPRESENTATIVES unless a contrary intention is expressed.

**E. Representative.** "REPRESENTATIVE" or "REPRESENTATIVES" refers to and includes any PERSON (as defined herein) who acts, has at any time acted, has at any time by any PERSON been requested or solicited to act, or has purported to act at the request of, or for the benefit of, or on behalf of any PERSON, including without limitation all agents acting on behalf of their principals.

**F. Related Party.** As used herein, the term "RELATED PARTY" means a PERSON or entity related to another by reason of any of the following:

1) Individuals being members of the same family. The family of an individual shall include his brothers and sisters (whether by whole or half blood), present spouse, prior spouses, ancestors, and lineal descendants.

2) A PERSON or entity and a partnership if the PERSON or entity is a general partner of the partnership or owns 50% or more of the capital interest, or the profits interest in such partnership.

3) A PERSON or entity and a corporation if the PERSON: (I) owns or holds 50% or more of the value of the outstanding stock of the corporation, or (ii) controls, either directly or indirectly through a RELATED PARTY, 50% or more of the voting power of the corporation.

4) Two corporations that are members of the same "controlled group" as that term is defined in Section 267 of the Internal Revenue Code, including without limitation, parent-subsidary corporations and brother-sister corporations.

5) Any trust, together with the trustees, fiduciaries and beneficiaries of such trust, with respect to which a RELATED PARTY is a trustor, fiduciary or beneficiary.

6) An entity with respect to which a RELATED PARTY owns or holds 50% or more of the equity or voting interest in such entity.

**G. Conjunctions.** As used herein, the conjunctions "and" and "or" shall be construed both conjunctively and disjunctively, and each shall include the other whenever such dual construction serves to bring within the scope of any request or category any DOCUMENT that would otherwise not be brought within its scope.

**H. Number and Gender.** As used herein, the singular form shall include the plural (and vice versa) and the masculine shall include the feminine and/or neuter (and conversely) whenever such construction serves to bring within the scope of any request or category any DOCUMENT that would otherwise not be brought within its scope.

#### **SPECIAL DEFINITIONS**

1. YOU or YOUR shall mean Interior defendants, and each of them, and their REPRESENTATIVES, including without limitation personal representatives and personal counsel.
2. IIM TRUST – the Individual Indian Monies Trust or the Individual Indian Trust.
3. IIM TRUST BENEFICIARY – An individual Indian on whose behalf, as trust beneficiary, an IIM TRUST account is, or at any time has been, should be, or should have been, maintained

by the United States or its agents and an individual Indian who holds or has held a beneficial interest, divided or undivided, in TRUST LAND, including restricted land; the term “IIM TRUST BENEFICIARY” shall include all heirs and successors-in-interest, including executors and personal representatives with respect to an IIM TRUST BENEFICIARY’S lands or estate.

4. LAND TRANSACTIONS – all requested, noticed, pending, completed, voided, invalidated, unconsummated, withdrawn, and voluntary and involuntary land transactions, including but not limited to commercial, industrial, recreational, agricultural, and other types of leases; rights-of-way; easements; other encumbrances, land sales and land exchanges; grazing and range permits; trespass damages assessments, and condemnation.

#### **DOCUMENTS AND INFORMATION TO BE PRODUCED**

**CATEGORY NO. 1:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the representation that “e-mail messages from two BIA servers were not being routed to the ZANTAZ digital safe, and had not been routed to the digital safe since June 2004.”<sup>1</sup> See Motion to Defer Zantaz Motion at 1.

**CATEGORY NO. 2:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the representation that “We understand that BIA retained messages routed through the two servers on backup tapes, and that no e-mail messages were lost.” See Motion to Defer Zantaz Motion at 1.

**CATEGORY NO. 3:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate

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<sup>1</sup>See Defendants' Motion to Defer Consideration of Defendants' "Zantaz Motion" as to the Bureau of Indian Affairs, filed December 16, 2004 (“Motion to Defer Zantaz Motion”).

to – directly or indirectly, generally or specifically, and implicitly or explicitly – the loss, destruction, modification, or corruption of any e-mail message since September 25, 2002.

**CATEGORY NO. 4:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the representation that all BIA e-mail servers were identified and incorporated in the ZANTAZ proposal to capture and preserve e-mail.

**CATEGORY NO. 5:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the representation that all BIA e-mail was captured by ZANTAZ or its REPRESENTATIVES since June 2004.

**CATEGORY NO. 6:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the representation that all BIA e-mail was preserved since June 2004.

**CATEGORY NO. 7:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the nature and scope of ZANTAZ's and its REPRESENTATIVE'S monitoring of e-mail volume from BIA's e-mail servers since June 2004.

**CATEGORY NO. 8:** ALL VERSIONS OF DOCUMENTS in the custody and control of the Interior defendants or their REPRESENTATIVES and all DOCUMENTS transmitted to, or received by, the Interior defendants or their REPRESENTATIVES that in whole or in part embody, refer to, or relate to – directly or indirectly, generally or specifically, and implicitly or explicitly – the security of any information technology system that ZANTAZ or its REPRESENTATIVES have employed to capture and archive the Interior's defendants' e-mail.

Respectfully submitted,

/s/ Dennis Gingold

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Attorneys for Plaintiffs

December 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing FOURTEENTH REQUEST FOR PRODUCTION OF DOCUMENTS was served on the Interior defendants via facsimile on this day, December 30, 2004 and the following individual by facsimile or regular mail.

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
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406.338.7530 (fax)

/s/ Geoffrey Rempel

\_\_\_\_\_  
Geoffrey M. Rempel

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, et al., )  
)  
Plaintiffs, )  
)  
v. )  
)  
GALE A. NORTON, Secretary of the )  
Interior, et al., )  
)  
Defendants. )  

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Case No. 1:96CV01285  
(Judge Lamberth)

**ORDER**

This matter comes before the Court on *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Donnie McClure*, Dkt #\_\_\_\_\_. Upon consideration of the motion, any responses thereto, and the record of this case, it is hereby

ORDERED that Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Donnie McClure is GRANTED. It is further

ORDERED that Plaintiffs may not depose Donnie McClure.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

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ROYCE C. LAMBERTH  
United States District Judge



cc:

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